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Supreme Court, U.S.
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No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1960

REVELL, INC., ET AL., PETITIONERS

v.

ROBERT A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE DISTRICT DIRECTOR AND THE UNITED STATES

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United States v. *Huntington Beach Co.*, 132 Ct. Cls. 427 — 6

Statutes:

Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.):

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit upholding the district court's dismissal of the petitioners' actions for injunctions appears at 273 F. 2d 649 and is reprinted as a Second Appendix to the Petition. The Court of Appeals for the Ninth Circuit issued no opinion in connection with its order denying leave to file petitions for writs of mandamus to the Tax Court.

JURISDICTION

The judgment of the court of appeals affirming the dismissal of the injunction proceedings was entered

on December 21, 1959 (App. R. 74).[1] A timely petition for rehearing was denied on March 23, 1960 (App. R. 83). The order denying leave to file petitions for mandamus was entered on April 1, 1960 (M.R. 10). The petition for writs of certiorari was filed on June 20, 1960.

QUESTIONS PRESENTED

1. Whether 90-day notices of deficiency as a preliminary to assessing and collecting federal taxes are valid when the determinations of deficiency on which they are based are founded on alternative and inconsistent factual and legal bases of liability.

2. Whether the court below properly refused to allow the filing of a petition for mandamus in order to review intermediate procedural steps in a Tax Court proceeding.

STATUTES INVOLVED

The principal statutory provisions involved are Sections 6212, 6213, and 7421 of the Internal Revenue Code of 1954 (26 U.S.C. 6212, 6213, and 7421), all of which are set forth in the opinion of the court below (Second Appendix to Petition, pp. 2, 16, 17) and the corresponding sections of the Internal Revenue Code of 1939, Sections 272 and 3653 (26 U.S.C. (1952 ed.) 272, 3653).

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[1] The petitioners have filed two separate records, one relating to the judgment of the court on the appeal from the district court and the second relating to the proceedings seeking mandamus. The two records will be referred to as "App. R. —" and "M. R. —."

STATEMENT

Since the issues raised by the petition do not involve questions of tax liability, but only questions of procedure, it will not be necessary to repeat the facts relating to liability, which in any event are set forth in some detail in the opinion of the court below. It will suffice to state that three separate cases involving the same issues were consolidated for argument below. In each, a multiplicity of related corporations, 16 in one case, 23 in the second, and 23 in the third, led to complicated issues in assessing income and excess profits taxes. As to each group the Commissioner sent multiple notices of tax deficiencies involving to some extent the same income, each notice being based on a different factual or legal theory and resulting in different tax liability. There were three notices in the first case, five in the second, and two in the third. Although the taxpayers petitioned for review in the Tax Court with respect to most of these deficiencies, they failed to pay the tax or to take any action in the Tax Court with respect to at least one notice in each of the cases, and the Commissioner thereupon proceeded to assess a tax with respect to each of these deficiencies as to which the tax had not been paid and review had not been sought in the Tax Court. Thereupon the taxpayers filed actions in the district court to enjoin the collection of the taxes so assessed and to cancel the purported assessments. The district court dismissed these actions on the ground that such injunctive proceedings were forbidden by Section 7421(a)

of the Internal Revenue Code of 1954, and the court of appeals affirmed the dismissals.

In its opinion the court below indicated that the fact that the Commissioner had chosen to make conflicting determinations against the same persons in respect to the same income might result in depriving such determinations of the presumption of correctness so that in the Tax Court proceedings the burden would be on the Commissioner to prove the correctness of his determination (Second Appendix to Petition, pp. 19–20). On the basis of this dictum, the petitioners moved in the Tax Court proceedings pending on their petitions for review of the alternative deficiency notices to require the Commissioner to state fully the facts relied on by him and his defense. The Tax Court denied this motion, and the petitioners thereupon petitioned the court below for leave to file motions for writs of mandamus. The court below denied this relief without opinion.

The petitioners seek to review both orders of the court below through this petition.

ARGUMENT

1. Actions to restrain the assessment or collection of federal taxes are expressly forbidden (26 U.S.C. 7421). However, an exception to this prohibition is provided where the Commissioner attempts to assess a deficiency or make a collection without sending a deficiency notice to the taxpayer (26 U.S.C. 6212, 6213).[2] The basis for petitioners' argument here is

[2] Insofar as the liability asserted against the petitioners is liability as transferees (App. R. 17, 19, 60–64), Section 7421(b) of the Internal Revenue Code of 1954 precludes injunctive

that the deficiency notices were invalid because the Commissioner had made no determination of the deficiency prior to the service of the notices. It is conceded that formal deficiency notices were properly issued, but it is argued that because of their inconsistency there was in fact no determination by the Commissioner within the meaning of the statute.

Where there are alternative possibilities of tax liability, either because of material issues of law or undetermined issues of fact, the Commissioner has consistently found it necessary, in order to prevent the statute of limitations from running on one alternative while the other was being resolved, to file alternative notices of liability. The logical consequence of the petitioners' argument is that in such circumstances the Commissioner would be required to elect among alternative theories of taxation at his peril. Thus, he would be bound by his initial determination in spite of the fact that that determination would frequently have to be made on the basis of incomplete information as to the crucial facts in the case or without judicial determination on a difficult issue of law.

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relief without any provision for the exception upon which the petitioners otherwise rely.

A classic example of the problems which confront the Commissioner in his attempts to protect the revenue was presented to this Court in *Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308. In that case, the question was whether the upland owners of land or a drilling company which had contracted to develop oil deposits thereon was entitled to the allowance for depletion. The Commissioner, as this Court noted, had taken inconsistent positions in the lower courts, in each instance opposing the depletion deduction. He was reversed by both the Court of

In issuing protective notices of deficiency it is not the purpose of the Government to collect the same tax more than once. Instead, the procedure is adopted only to make certain that the tax will be collected at least once when the questions as to its amount and the proper taxpayer have been finally determined.

The petitioners do not attack the sufficiency of any one of the deficiency notices standing by itself. The court below found that they were "thoughtful and considered" determinations of deficiency. They contain detailed information informing the taxpayers of the basis for the asserted deficiencies and advise them

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Claims (*United States* v. *Huntington Beach Co.*, 132 C. Cls. 427) and the Ninth Circuit (*Commissioner* v. *Southwest Exploration Co.*, 220 F. 2d 58), each allowing the deduction. Certiorari was granted "because both the drilling company and the upland owners cannot be entitled to depletion on the same income." (350 U.S., p. 369.) Thus, it was not until the matter was before this Court that the Commissioner was able, without prejudicing federal tax collections, to argue that the upland owners were entitled to the deduction. Obviously, if the petitioners' rationale in these cases is correct, the Commissioner would have been obligated to choose between the drilling company and the owners at the deficiency notice stage of the proceedings. If he chose incorrectly, the statute of limitations on assessment would have run by the time a final adjudication had been made by this Court, and both parties would possibly have been allowed the deduction in question—one by virtue of a court decision and the other because of the legal inability of the Commissioner to contest the deduction in the courts. There are no reasons, legal or logical, why such a result should prevail. The petitioners' distinction that not only different theories of taxation, but different taxpayers, were involved does not differentiate this case from the ones before the Court. Actually in one of them different taxpayers are in fact involved, but the Government believes that alternative theories can be pursued even as to the same taxpayer.

of their rights. Had they chosen to do so, the petitioners could have sought review of all of the claimed deficiencies in the Tax Court, thus precluding any attempt at collection prior to a final determination of liability and avoiding the division of the cases between separate courts. If, for their own reasons, the petitioners chose not to take this course, they have no cause for complaint here.

2. The refusal of the court below to permit the use of mandamus to the Tax Court in order to test the denial by it of the motion to require the Government to set forth the facts on which it relied as a defense was entirely correct. Appeal is provided only from a final decision in Tax Court cases; it may not be taken from an interlocutory order. The petitions for mandamus which the petitioners attempted to file were no more than an attempt to accomplish indirectly what they were not permitted to accomplish through direct appeal.

CONCLUSION

The decisions below are correct and involve no conflict. The petition for writs of certiorari should be denied.

Respectfully submitted.

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